No. 275

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA EX REL. HUBERT JAEGGLER, PETITIONER

v.

UGO CARUSI, COMMISSIONER OF IMMIGRATION AND NATURALIZATION AND CARL ZIMMERMAN, DISTRICT DIRECTOR FOR DISTRICT NO. 2, PHILADELPHIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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UGO CARUSI, COMMISSIONER OF IMMIGRATION AND NATURALIZATION AND CARL ZIMMERMAN, DISTRICT DIRECTOR FOR DISTRICT NO. 2, PHILADELPHIA [1]

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OPINIONS BELOW

The order of the District Court for the Eastern District of Pennsylvania, discharging the writ of

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[1] Ugo Carusi has not been Commissioner of Immigration and Naturalization for some time, but Carl Zimmerman is still District Director for District No. 2 of the Immigration and Naturalization Service. Accordingly, there is no problem of abatement in this case.

habeas corpus (R. 45), is not reported. The opinion of the Court of Appeals for the Third Circuit (R. 50) is reported at 187 F. 2d 912.

JURISDICTION

The judgment of the Court of Appeals was filed on April 2, 1951 (R. 56). On June 27, 1951, an order extending the time for filing a petition for a writ of certiorari to August 29, 1951, was issued by Mr. Justice Black (R. 57). The petition for a writ of certiorari was filed on August 24, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented involve the validity of an order of the Attorney General directing petitioner's removal to Germany as an alien enemy. The primary issues are:

1. Whether petitioner has been deprived of his privilege of voluntary departure before removal, accorded him by the Alien Enemy Act of 1798, by the action of the State Department in notifying various allied and neutral countries, chiefly in the Western Hemisphere, that petitioner was a person deemed dangerous to hemisphere security.

2. Whether anything in the proceedings resulting in the order of removal deprived petitioner of due process of law.

STATUTE, PROCLAMATION, AND REGULATIONS INVOLVED

The pertinent provisions of the Alien Act of 1798, R. S. 4067, as amended, 40 Stat. 531, 50 U.S.C. 21, are set out in Appendix A, *infra*, p. 10. Presidential Proclamation 2655, 10 Fed. Reg. 8947, and the Attorney General's Regulations pursuant thereto are set forth in Appendices B and C, respectively, *infra*, pp. 11-16.

STATEMENT

Petitioner is a German national, resident in Philadelphia, who was interned during the war as an enemy alien. In May, 1946, after a hearing, the Attorney General, acting under Presidential Proclamation 2655 (*infra*, pp. 11-13), pursuant to the Alien Enemy Act (*infra*, p. 10), ordered petitioner's removal to Germany. In accordance with the practice under the Attorney General's regulations, *infra*, pp. 15-16, petitioner was released on parole for thirty days, in order to settle his affairs and to permit him to leave the United States voluntarily (R. 19). Instead, he filed a petition for a writ of habeas corpus, based chiefly on the theory that he had been deprived of the kind of a hearing to which he felt himself entitled (R. 3). Respondents' return to the writ (R. 12) admitted most of the material facts and contended that they constituted no basis for relief (R. 16).[2] Petitioner thereupon

[2] An issue was raised at this point as to whether the court had jurisdiction to issue a writ for the production of the body of a relator who was free on parole, but the District Court's resolution of this issue in petitioner's favor was not challenged in the court below.

filed a traverse to the return (R. 19), alleging that the respondents had effectively deprived him of his opportunity to depart voluntarily to a country of his choice. This result, he alleged, was brought about by the action of the State Department in circularizing all the Western Hemisphere nations and certain European countries with a so-called blacklist containing the names of 417 dangerous enemy aliens, among whom petitioner was included (R. 21). This blacklist, petitioner contended, had the practical effect of inducing the circularized nations to deny him visas (R. 20). On respondents' motion, the District Court, holding in effect that the facts as alleged in the petition, the traverse, and the answering affidavits of the respondent admitting the circularization of the list (R. 26), did not present grounds for relief, discharged the writ (R. 45). On appeal, the court below affirmed this order of dismissal (R. 56).

ARGUMENT

1. This is another in a series of cases which have challenged the validity of the State Department's action in circularizing its list of German aliens dangerous to Western Hemisphere security. These challenges have up to now been uniformly rejected, and this Court has refused to consider them. Cf. *United States* ex rel. *Dorfler* v. *Watkins*, 171 F. 2d 431 (C.A. 2), certiorari denied, 337 U. S. 914; *United States* ex rel. *Hoehn* v. *Shaughnessy*, 175 F. 2d 116 (C.A. 2), certiorari denied, 338 U. S.

872;[3] *United States* ex rel. *Aigner* v. *Shaughnessy*, 175 F. 2d 211 (C.A. 2). The facts in these cases were not substantially different from those of the present case; and the decision below was, we submit, manifestly correct.

The court below recognized that the Alien Enemy Act precludes the Attorney General from removing an alien until he "neglects" or "refuses" to depart voluntarily, after a reasonable opportunity to do so. *United States* ex rel. *Von Heymann* v. *Watkins*, 159 F. 2d 650 (C.A. 2). But it correctly held that petitioner in this case has not been deprived of this privilege of voluntary departure. The *Dorfler* case stated the rule in these terms: "The privilege of voluntary departure does not imply that the alien must be able to go to the country of his choice. So long as there is any foreign country to which he could have gone, his failure to go there is a 'neglect' or 'refusal' to depart voluntarily. Hence a communication by the State Department to a foreign country, which that country may or may not heed, cannot be regarded as an unlawful restraint on the alien's voluntary departure." 171 F. 2d 431, 432. The circumstances of the present case demonstrate both the present applicability and the correctness of this rule.

The list of dangerous enemy aliens was circulated to the other American nations in compliance

[3] The Government's Briefs in Opposition in both the *Dorfler* case (No. 655, Oct. Term, 1948) and the *Hoehn* case (No. 308, Oct. Term, 1949) deal with this contention.

with Resolution VII of the 1945 Inter-American Conference of Mexico City, 12 Dep't State Bull. 344, which resolution called upon all the American nations to prevent such persons from remaining in the Western Hemisphere (R. 27). The obvious purpose of the Resolution was to extend, on a hemispheric basis, the same policy of discretionary removal that the fifth Congress enacted for the United States in the Alien Enemy Act. Common sense dictates that steps be taken, in the interest of the common defense, to hinder dangerous elements removed from any American nation from transferring their activities elsewhere in the Western Hemisphere. This policy was crystallized in the program contemplated by the Mexico City Conference (R. 33), and the circularization was an effort to ensure that all of the American Republics were aware that the listed persons might disturb or threaten the individual or collective security and welfare of the Western Hemisphere. The statutory privilege of voluntary departure cannot reasonably be read as requiring the United States to remain silent while such elements make their way into other nations. The latter in all probability would sooner or later in turn be faced with the necessity, for their own security, of expelling them.

Thus, it follows that the privilege of voluntary departure cannot mean that the petitioner must be left free to go to whatever place he chooses. At most, it could only mean that he must be free to go

somewhere—presumably to a country with whose principles of government his allegiance would be compatible. Even if Germany were the only country which would receive petitioner, he could not complain, for this would merely mean that only in Germany was he not considered subversive.

Petitioner, in an apparent attempt to distinguish this case from the facts of the *Dorfler* case, criticizes the enumeration by the court below of a number of countries outside Germany and the Iron Curtain nations, which were not circularized by the State Department, but to which petitioner did not bother to apply (R. 54). The petition for a writ of certiorari lists a large number of nations which petitioner claims either refused him visas or had no consulate in New York. These allegations are not supported by the record.[4] The only specific statement in the record on the matter shows that, besides the Latin American republics, the blacklist was circulated to Canada, England, France, Switzerland, Spain, Portugal, and Sweden (R. 27). This would seem to leave petitioner, in Western Europe alone, such available alternatives

[4] The only indications in the record of any attempt by petitioner to contact any of these countries are those inferable from the allegations in the traverse to the return that "Relator has been informed by his attorneys that * * * it is useless for him to make application to any Consul to go to any other American country, or any European country other than to Germany." (R. 22), and in the affidavit of petitioner's counsel that "Relator * * * tried to obtain Visas and was refused by reason of the fact that his name appeared on the list of 417 enemy aliens * * *" (R. 39).

as Norway, Denmark, the Low Countries, and Italy, which were apparently not circularized.

It should be pointed out, finally, that the State Department's circulars did not make it impossible for listed aliens to enter the circularized nations. The circulars pointed out that the United States was in no way preventing the listed aliens from entering the other nations, if these nations were willing to admit them (R. 27-29).[5] The necessary conclusion from all these facts is that petitioner was clearly afforded the statutory opportunity to leave voluntarily.

2. Petitioner's second contention is that the hearing afforded him before a Repatriation Board, at which time it was determined to remove him, failed to conform to the requirements of due process. This Court has disposed of this contention in *Ludecke* v. *Watkins*, 335 U. S. 160, which held that removal of an alien enemy may be effected without hearing. In any event, there is no specification of any aspects in which the procedure failed to provide due process.[6]

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[5] An instance is reported in which Brazil issued a visa to an enemy alien notwithstanding the appearance of his name on the circularized list. See R. 19, *United States* ex rel. *Dorfler* v. *Watkins*, No. 655, October Term, 1948.

[6] Petitioner makes certain other contentions, which appear to be frivolous. He contends that the removal order violates international agreements to which the United States is a party; but he points to no provision of any agreement, nor are we aware of any, which could be thought to impair the power of the United States to remove alien enemies in time of war.

CONCLUSION

The decision below is correct and contains nothing which warrants review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
T. S. L. PERLMAN,
Attorneys.

SEPTEMBER, 1951.

APPENDIX A

The Alien Enemy Act of 1798, R. S. 4067, as amended, 50 U.S.C. 21, provides:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

APPENDIX B

Proclamation 2655, issued by President Truman on July 14, 1945, provides (10 Fed. Reg. 8947):

A PROCLAMATION

Whereas section 4067 of the Revised Statutes of the United States (50 U.S.C. 21) provides:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety;"

Whereas sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U.S.C. 22, 23, 24) make further provision relative to alien enemies;

Whereas the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

Whereas by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

Whereas I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

Now, therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United

States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

By the President:

[SEAL.] HARRY S. TRUMAN.

JAMES F. BYRNES,
Secretary of State.

APPENDIX C

Regulations of the Attorney General (10 Fed. Reg. 12189), pursuant to Presidential Proclamation 2655:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM THE U.S.

Sec.

Authority: §§ 30.71 to 30.75, inclusive, issued under R. S. 4067; 50 U.S.C. 21.

§ 30.71 *Removal from the United States of alien enemies.*—The Proclamation of the President of the United States, No. 2655 (10 F.R. 8947), dated July 14, 1945, provided in part:

"All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be sub-

ject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe."

§ 30.72 *Order of the Attorney General.*—When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principles of government thereof, an order will be signed by the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen, or subject.

§ 30.73 *Service of removal order on alien enemy.*—A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.74. *Thirty-day period for voluntary departure.*—An alien enemy who is the subject of a removal order shall have thirty (30) days after receiving notification of the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from internment under appropriate parole safeguards in order that the alien enemy may

settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.75 *Involuntary removal from the United States.*—In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

Approved: September 26, 1945.

TOM CLARK, *Attorney General.*

(F. R. Doc. 45-18005; Filed Sept. 27, 1945; 10:11 A.M.)

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